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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 595

MRS. FANNIE E. LANG, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WASHINGTON BOWIE, JR.,
Counsel for Petitioner.

J. R. SHERROD,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION.

Mrs. Fannie E. Lang, by her attorney, Washington Bowie, Jr., prays that a writ of certiorari issue to review a decision of the United States Circuit Court of Appeals for the Fourth Circuit, entered on October 8th, 1932 (61 Fed. (2d) 280), affirming a decision of the United States Board of Tax Appeals (23 B. T. A. 854).

A.

STATEMENT.

This is a Federal income tax case. The question is—What is the basis upon which gain or loss is computed

when the surviving tenant of a tenancy by the entirety sells property formerly owned by such tenancy?

In 1915, Walter B. Lang and his wife, the petitioner herein, purchased realty in Catonsville, Maryland, at a cost of $13,000.00, of which the husband contributed $11,440.00, and your petitioner $1,560.00. Title was taken by them as tenants by the entirety. Of the total cost, the husband paid 88 per cent, and your petitioner paid 12 per cent.

The husband died in 1924, at which time the realty had a fair market value of $40,000.00. In the deceased husband's Federal estate tax return, the realty was reported as $35,200.00, being 88 per cent of the fair market value and a Federal estate tax was paid on that basis.

Your petitioner, as the surviving tenant, sold this realty in 1925 for $40,000.00, less selling expenses of $2,055.80, or a net sales price of $37,944.20. In computing the profit on said sale, the respondent herein used as a basis the cost of the property to the two tenants in 1915. Your petitioner claims that in computing the profit, the respondent should have used as a base the cost to your petitioner, plus the appreciated value of the husband's investment in 1924, the date of the husband's death, which appreciated value became part of the corpus of the husband's estate, or in other words—capital—and that capital or corpus can never be taxed as income under the Sixteenth Amendment to the Constitution of the United States.

Specification of Error to be Urged.

The Circuit Court of Appeals erred in holding that in computing the profit upon the sale by a surviving tenant of property formerly held by husband and wife as

tenants by the entirety, the basis for such computation should be the cost of such property, to the surviving and the deceased tenants, instead of the cost to the surviving tenant, plus the appreciated value of the husband's investment at the date of the deceased husband's death, which appreciated value was subjected to Federal estate taxes.

B.

REASONS FOR GRANTING THE WRIT.

(1) The decision of the Court below is in conflict with the principles laid down by this Court in Tyler vs. U. S., 281 U. S. 497, 74 L. Ed. 991, 8 A. F. T. R. 10912, subsequently explained in Phillips vs. Dime Trust & Safe Deposit Company, 284 U. S. 160; 10 A. F. T. R. 459. In the former case, the Court held that all the appreciation which had occurred or accrued on his share prior to one tenant's death could be subjected to the Federal estate tax, as part of the corpus of the deceased tenant's estate. The Commissioner in that case argued for the adoption of a practical rule of taxation law, as applied to tenancies by the entirety, and the Court adopted this construction. When it comes to the income tax side of the law, the Commissioner argues for the application of the strict common law principles governing property held as tenants by the entirety. His position is inconsistent and will result in great injustice.

(2) The decision of the Court below is contrary to the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of Commissioner vs. Fletcher Savings & Trust Company, Executor, 59 Fed. (2d) 508, where it was held that in the case of a tenancy by the entirety, the surviving tenant took the interest in the realty which her husband held at the time of his death

by "inheritance" as that term was used in Section 204(a)(5) of the Revenue Act of 1924, and Section 303(a)(2) of the Revenue Act of 1924.

(3) Double taxation results from the decision of the Court below. Congress showed its intent to subject the value of property held by a tenancy by the entirety to estate tax, but no intention is revealed to tax as income values previously taxed as corpus or capital of an estate.

(4) The decision of the court below is in conflict with the long-established and recognized decision of the United States Court of Claims in the case of Nichols vs. U. S., 64 Ct. Cls. 241, 6 A. F. T. R. 6592, which established the principle that appreciation or values once subjected to an estate tax as part of the corpus of an estate cannot by legislative or administrative fiat be taxed as income.

(5) The decision of the court below is in error in failing to apply the express provisions of Section 204(a)(5) of the Revenue Act of 1926 which provides that the basis for computing gain or loss upon the sale of property, acquired by "inheritance" is the value of the property at the time inherited.

(6) The decision of the court below is also in conflict with the decision of this Honorable Court in the case of U. S. vs. Supplee-Biddle Hardware Company, 265 U. S. 189, 4 A. F. T. R. 3989, where it was held that the proceeds of life insurance policies which could be taxed under the estate tax act could not again be taxed as income when received by the estate or a beneficiary, because of the result in double taxation, and such construction should be avoided.

(7) The question involved herein is of great general interest because a large percentage of homes, farms, etc., in this country are held under tenancies by the entirety, and would be subjected to double taxation upon any sale.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 3302, Mrs. Fannie E. Lang, Petitioner vs. Commissioner of Internal Revenue, Respondent, and that said judgment of the Circuit Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

FANNIE E. LANG,

By: WASHINGTON BOWIE, JR.,

Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No.....

MRS. FANNIE E. LANG, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the Circuit Court of Appeals is reported in 61 Fed. (2nd) 280.

Also it is copied in the record at page 25.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is October 8th, 1932 (R. 33).

2. This is a case arising under the income tax laws and involves the construction of the statute relative

to estates by the entirety, which has not heretofore been considered by this Court.

Petitioner contended that a deficiency in income tax assessed against her for the year 1925 in the amount of $1,355.81 was in error, in that certain real estate sold by her in 1925 having been acquired by her and her husband in 1915 as tenants by the entireties, the correct basis for determination of gain or loss on such sale is the value of the interest of her husband therein which was transferred to her at the time of his death in 1924 plus the cost of her interest therein at the time of the purchase (R. 13). The Circuit Court of Appeals denied this claim (R. 31).

Petitioner further contended that her husband, the other tenant by the entirety, died possessed of a definite financial interest in the real estate, which interest was transmitted by operation of law to her as the surviving tenant by the entirety. That this interest constituted a definite part of the corpus of his estate for the purpose of the Federal estate tax and was made the subject of said tax. That the inclusion of this interest in the decedent's taxable estate fixed both its status and value as an interest transmitted at or by reason of death, and that this transmission was by way of bequest, devise or inheritance within the meaning of the statute (R. 14). The Circuit Court of Appeals denied this claim (R. 29).

3. The jurisdiction of this Court is invoked under the provisions of the Judicial Code, Section 240, as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347).

III.

Statement of the Case.

Petitioner and her husband purchased a piece of real estate in 1915. Petitioner contributed 12% of the purchase price and her husband contributed 88%. Title to the property was taken by them as tenants by the entirety (R. 12). The husband died in 1924. Petitioner was executrix of his will and sole beneficiary thereunder (R. 13). This real estate was included in the estate tax return and a Federal estate tax, based upon the value of the husband's interest in said real estate at the time of his death, was paid (R. 13). This real estate was sold in 1925 by the petitioner for the same sum as it was appraised at in 1924 (R. 13). In making her income tax return for that year she treated 88% of the sale value of said real estate (the share of the purchase price contributed by her husband) as having been received by her at his death in 1924.

However, the Commissioner of Internal Revenue made a computation based upon the price paid in 1915 and its sale in 1925, disregarding altogether the fact of the death of the husband and the inclusion in his estate of the value of his interest in said property, at its then value, and the payment of the Federal estate tax thereon (R. 7, 8).

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in finding and holding that for income tax purposes, property must be deemed acquired by taxpayer when she and her husband purchased it as tenants by the entireties.

2. The Circuit Court of Appeals erred in finding and holding that within the meaning of the income tax law the

devolution of the property rights upon the surviving tenant upon the happening of an event, the death of the other tenant by the entirety, is not an acquisition by "bequest, devise or inheritance."

V.

ARGUMENT.

Summary of the Argument.

Point A.—The Decision Below is Contrary to and in Conflict with Prior Decisions of this Court and the Circuit Court of Appeals for the Seventh Circuit.

Point B.—The Statute Shows that it was the Intention of the Congress to Impose But One Tax Upon Each Increase in Value of Property and this Intention Should Be Given Effect.

POINT A.

The Decision Below Is Contrary To and In Conflict With Prior Decisions of This Court and the Circuit Court of Appeals for the Seventh Circuit.

The Statute involved is Section 204(a) of the Revenue Act of 1926, which provides:

> "Sec. 204(a). The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28th, 1913, shall be the cost of such property; except that * * *
>
> (5) If the property was acquired by bequest, devise or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision * * * (c) or (f) of Section 302 of the Revenue Act of 1924, or in subdivision (c)

or (f) of Section 302 of this Act." U. S. C. A., Title 26, Sec. 935.

The estate tax provisions of the statute and the regulations are set out in full in the opinion of the Court below (R. 26) and in the interest of brevity are not repeated here.

Section 302 of the Act above referred to is a part of the estate tax provisions of the statute and subdivisions (c) and (f) refer to transfers in trust or otherwise *causa mortis*, and property passing under a general power of appointment exercised by the decedent respectively.

Subdivision (e) of said section (302) provides for the imposition of the estate tax on tenancies by the entirety and the property here involved was taxed thereunder upon the death of the husband to the extent of 88% of its appraised value, that 88% being the interest of the husband therein.

In *Tyler v. United States*, 281 U. S. 497; 8 A. F. T. R. 10912:

this Court construed the Act of 1916 as to the estate tax upon property held as tenants by the entirety, the provisions of which—Sec. 202(c)—are identical with the provisions of the 1926 Act—Sec. 302(e). There this Court, in upholding the constitutionality of the estate tax upon the interest of the deceased tenant by the entirety said that the amiable fiction of the common law by which husband and wife are but one person and therefore upon the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other, seems unsubstantial when applied to a taxing act. That actual results rather than artificial rules should govern. It is then held (p. 504):

> "Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other."

In *Phillips v. Dime Trust & Safe Deposit Co.*, 284 U. S. 160; 10 A. F. T. R. 459:

this Court said that the Tyler case held that the "tax imposed under Sec. 202(c) Revenue Act of 1916, was a valid indirect tax, measured by the value of the property, *rights in which devolved upon the surviving tenant upon the happening of an event, the death of the other tenant by the entirety.*" (Italics supplied.)

In the case at bar the Circuit Court of Appeals distinguishes it from the Tyler case on the ground that, for estate tax purposes the Congress has expressly enumerated estates by the entirety, but that in the income tax portion of the statute, the Congress has omitted to enumerate estates by the entirety in designating the character of transfers to which the standard of value at the time of acquisition shall apply, saying:

> "In the statute here under consideration there is no such express enumeration of estates by the entirety, and it follows that, *if* they cannot be regarded as 'inheritances' the property in question, under the Maryland law, must be regarded for income tax purposes as being acquired by the petitioner at the time she and her husband purchased it, and valued as of that date and not as of the date of her husband's death." (R. 31.)

That Court does not discuss whether or not the devolution of these property rights upon the surviving tenant can be regarded as "inheritances" but, by affirming the decision of the Board of Tax Appeals, it necessarily holds that they cannot be.

In the case at bar the husband devised his entire estate to his wife (R. 13).

In *Commissioner v. Fletcher Savings and Trust Co., Executor,* 59 Fed. (2nd) 508:

the Circuit Court of Appeals for the 7th Circuit held that in a case of tenancy by the entireties the wife took the interest in the realty which her husband held at the time of his death by "inheritance" as that word may be fairly construed.

In that case, as in the case at bar, the sole issue was as to how the wife acquired the interest in the realty which her husband had at the time of his death. In both cases the title to the property was, during the lives of both spouses, held as tenants by the entirety. In both cases the statutes exempted from the computation in arriving at the tax to be imposed property acquired by "bequest, devise or inheritance" and in both cases the wife was the sole beneficiary under her husband's will.

It is inconceivable that the Congress, when it used the generic term, "bequest, devise or inheritance" in Section 204(a) of the statute, did *not* intend it to embrace the interest which devolves upon the surviving tenant upon the happening of an event—the death of the other tenant by the entirety—but that when it used the same term, "bequest, devise or inheritance" in Section 303(a)(2) of the same statute it *did* intend to embrace the same interest.

This in an important question of federal law, upon which two Circuit Courts of Appeal have reached opposite conclusions, and which has not been but should be settled by this Court.

The effect of the decision of this Court in the Tyler case (281 U. S. 497) is that for Internal Revenue Tax purposes, the "amiable fictions of the common law" as to tenancies by the entirety are to be disregarded and the devolution of property is to be looked at from a practical standpoint. The acquisition of rights in real estate, upon the death of the owner of these rights, would seem to be, from a practical viewpoint an acquisition by inheritance.

It is a forced and unnecessary construction to hold that the Congress intended that these rights of property should be recognized up to the moment of transfer to and acquisition by the surviving tenant for the purpose of taxing, then *eo instante* they should pass out of existence forever.

POINT B.

The Statute Shows That It Was the Intention of the Congress To Impose But One Tax Upon Each Increase in Value of Property and This Intention Should Be Given Effect.

The terms, "by purchase, gift, bequest, devise or inheritance" would seem to embrace all of the means or channels through which property is acquired and it must be assumed that the Congress, when it used these terms, intended to embrace all of the channels through which property can be acquired.

These terms are used alike in the statute in both the estate tax and income tax provisions.

Granting that the estate tax provisions "are a part of the general plan to prevent avoidance of taxation," consistency requires that the very principles, upon which the prevention of such avoidance rests, should be recognized

and adhered to when subsequently dealing with the same interests and their values in relation to the surviving spouse whose interest in the property was affected by the adoption of such principles.

The Congress having in mind the fact that property could escape bearing its just proportion of death duties, if the title was held as joint tenant or tenants by the entirety, took the precaution in enumerating the sources of death duties to specifically mention the interest of the deceased in property held jointly or by the entirety in framing the estate tax law. The rule of property therein set up in respect to all joint tenancies (including tenancies by the entireties) is that the joint interest is divided into parts, in the proportion of the respective financial interests of the co-tenants, according to their percentage of contribution to the cost of the property. That is, the statute looks upon the co-tenants as though they were tenants in common with the right of survivorship. This rule of property—an artificial one to be sure, but a rule nevertheless—set up and applied for the purpose of practical taxation, is necessarily two-fold, in that it affects both the decedent and the survivor, because in defining the interest of the decedent and its value at his death, it also establishes the post mortem interest of the survivor and its value to her. It follows, therefore, that the interest which passed to the wife from her husband at his death had imparted to it, under this rule of property, the quasi-character of inheritance, and that it retains this character for the purpose of the income tax.

A transfer of property from an owner at death to a living person by operation of law, in common acceptance, is an inheritance.

In *U. S. v. Tyler,* 33 Fed. (2nd) 724 (C. C. A. 4th Cir.) it is said:

> "We see no reason why the casting of the entire estate upon the survivor, which takes place by operation of law in case of death of one of the tenants by entireties, cannot be made the basis of taxation as well as the casting of succession upon the heir, which takes place in the case of intestate succession. The surviving spouse receives an enlargement of his interest in the property in the one case just as the heir receives an interest in the property in the other; and in both cases it comes by operation of law."

The word "inherit" is used in law "in contradistinction to acquire by will, * * * to receive by transmission in any way, have imparted to or conferred upon; acquire from any source."

In re: White's Estate, 84 Pac. 831-2; 42 Wash. 360.

"Inheritance" in its popular acceptation includes all the methods by which a child or relation takes property from another at his death except by devise, and includes as well succession as descent.

Adams v. Akerlund, 48 N. E. 454-7; 168 Ill. 632.

Where the word "inheritance" is used in a statute, it will be construed to mean "any property passing by death to those entitled to succeed." "Whatever is transmitted by descent or succession."

Glascott v. Bragg, 87 N. W. 853; 111 Wis. 605.

The Circuit Court of Appeals for the 7th Circuit has reached the conclusion that the transfer of these interests from the husband to the surviving wife comes to her by way of inheritance.

In *Commissioner v. Fletcher Svgs. Bank & Trust Co., Excr.*, 59 Fed. (2nd) 508:

the only difference in facts is that there the deduction had been made by the executor of the formerly surviving spouse in its estate tax return, while here the sale was made by the surviving spouse. There, after stating that the right to deduct depended upon whether the transfer of that interest to the surviving spouse from her husband's estate came by way of gift, bequest, devise or inheritance, the Court said:

> "We think the word 'inheritance' may be fairly construed to include this transfer, and we are convinced that Congress so intended it. While in legal parlance we generally regard the meaning of the word 'inheritance' as the acquisition of property by one person as heir to another, yet it also means the act of possessing, receiving, obtaining, or succeeding to. The right to receive the entire property upon her husband's death came from the deed which created the estate by the entirety. The transfer to her of the interest therein which her husband had at the time of his death, and which transfer was necessary for her to completely hold and enjoy that right which the deed had given her, came from her husband's estate. She succeeded to her husband's right. She received and obtained and came into possession of it, and in that sense we think she must be considered as having inherited it from her husband's estate."

The inclusion of special interests as corpus of an estate, for Estate Tax purposes, fixes their status in the hands of the decedent and they become and remain corpus as to income tax procedure. No part of their value so fixed as corpus can become gain or income in the hands of a fiduciary or any beneficiary or distributee of said estate, as the result of realizing on them through subsequent sale. Only the excess realized above that corpus value would constitute income or gain.

Nichols vs. U. S. 64 Ct. Cl. 241 (6 A. F. T. R. 6592).

In *U. S. v. Supplee-Biddle Co.*, 265 U. S. 196, 4 A. F. T. R. 3989:

this Honorable Court said (with reference to life insurance policies):

> "Assuming, without deciding, that Congress could call the proceeds of such indemnity income, and validly tax it as such, we think * * * such a purpose on its part should be express, as it certainly is not here. * * * The result of the construction put by the government upon Secs. * * * would be to impose a double tax on the proceeds of the two policies in this case * * * i. e. an income tax and an estate tax. Such a duplication, even in an exigent war-tax measure, is to be avoided unless required by express words."

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the judgment of the Circuit Court of Appeals for the Fourth Circuit, entered on the 8th day of October, 1932, may be reversed by this Honorable Court and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Fourth Circuit and finally reverse it.

WASHINGTON BOWIE, JR.,
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J. R. SHERROD,
Of Counsel.